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NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v.  
McCORMICK.

Jan. 31, 1907.

[56 S. E. 281.]

**1. Pleading—Objection to Evidence—Variance—Waiver.**—Va. Code 1904, § 3384, provides that, if at the trial there appears to be a variance between the evidence and allegations, the court, if justice will be promoted, may allow the pleadings to be amended, or direct the jury to find the facts, and, after such finding, if it considers the variance such as could not have prejudiced the opposite party, shall give judgment according to the rights of the case. Held that, where no objection was made to the admissibility of evidence and no motion made to exclude on account of a supposed variance, the objection must be considered on appeal as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1438-1441.]

**2. Trial—Instructions—Form.**—Instructions should be concrete, and should not enunciate merely abstract propositions of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 582, 583.]

**3. Appeal and Error—Harmless Error—Instructions.**—The giving of an instruction enunciating merely an abstract proposition of law, instead of being concrete, is no ground for reversal, unless it appears that it was calculated to mislead or confuse the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219, 4220; vol. 46, Trial, § 584.]

**4. Trial—Instructions—Application to Evidence.**—Where in an action against a carrier for injuries to a passenger, the evidence for plaintiff showed the accident to be the result of the negligence of the motorman in prematurely starting the car when plaintiff was alighting, and the defense was that plaintiff stepped from the car while it was moving, an instruction that, though plaintiff was guilty of contributory negligence, yet, if the jury believed that the conductor knew of such negligence and could have avoided the accident, plaintiff's negligence would not defeat a recovery, was reversible error, as involving a hypothesis having no foundation in the evidence and tending to deprive the defendant of the defense of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-603; vol. 9, Carriers, § 1498.]

**5. Carriers—Injury to Passenger—Contributory Negligence.**—Where the operatives of a street car negligently carry a passenger beyond his destination, such conduct does not absolve him from contributory negligence in jumping from the car while it is in motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1391-1393.]

**6. Same—Questions for Jury.**—It is not negligence as a matter of

law for a passenger to alight from a moving street car; but the question is for the jury under all the circumstances of the particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1361½, 1402.]

#### THOMAS *v.* COMMONWEALTH.

March 14, 1907.

[56 S. E. 705.]

**1. Criminal Law—Appeal—Review—Necessity of Exceptions.**—A ruling of the trial court, to which no exception was taken, will not be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2656.]

**2. Same—Sufficiency of Evidence.**—On appeal in a criminal case, in reviewing the denial of a motion for a new trial for insufficiency of the evidence, a new trial will not be awarded unless it appears that the evidence is plainly insufficient to warrant the finding of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3226.]

**3. Rape—Evidence—Sufficiency.**—On a prosecution for rape, evidence held sufficient to warrant a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 71-84.]

On Rehearing.

**4. Criminal Law—Appeal—Review—Sufficiency of Evidence.**—By the express provisions of Code 1904, § 3484, the evidence on a motion to set aside a verdict as contrary to the evidence in a criminal, as well as in a civil, case, is to be considered on appeal as on a demurrer to the evidence.

**5. Rape—Appeal—Review—Sufficiency of Evidence.**—Rev. Code, § 3484, provides that the evidence, on a motion to set aside a verdict as contrary to the evidence, shall be considered on appeal as on a demurrer to the evidence. Held, that the identification of defendant by prosecutrix, although uncorroborated, is not insufficient to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 83-84.]

**6. Criminal Law—Trial—Objections to Evidence.**—A general objection to evidence, which is in part admissible, is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1633-1638.]

**7. Same—Appeal—Scope of Review—Necessity of Exceptions.**—An objection to evidence cannot be considered on appeal, where not preserved by a proper bill of exceptions.